APPEAL NO. 061027
FILED JULY 20, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 11, 2006. With regard to the only issue before him the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter.

The appellant (carrier) appeals, contending that the hearing officer misapplied the 1989 Act and the Texas Department of Insurance, Division of Workers' Compensation (Division) rules. The file forwarded for review does not have a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable right eye injury on _____, with a 19% impairment rating (IR), that impairment income benefits (IIBs) were not commuted, that the qualifying period for the first quarter was from October 2 through December 31, 2005, and that the first quarter was from January 14 through April 14, 2006. The hearing officer's Background Information factual recitation about the claimant's right eye injury and how that prevents him from returning to his preinjury occupation as a truck driver because of loss of peripheral vision and that the claimant's unemployment is a direct result of his impairment is supported by the evidence. The hearing officer's determination that the claimant was unemployed as a direct result of the impairment from the compensable injury is affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 as amended by the 79th legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) states that the Division commissioner by rule shall adopt compliance standards for SIBs recipients. In that no such rules have been implemented as of this date, we refer to the eligibility criteria for SIBs entitlement in 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)). Commissioner's Bulletin No. B-0058-05 dated September 23, 2005, provides that until new SIBs rules are adopted, the Division's Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, reapealed, or modified by the Commissioner of Workers' Compensation. Also, Rule 130.100(a) provides that entitlement or non-entitlement to SIBs shall be determined in accordance with the rules in effect on the date a qualifying period begins, which in this case was October 2, 2005.

The hearing officer commented that the claimant had inquired about Department of Assistive and Rehabilitative Services (DARS), but did not request an interview and may not be eligible for services. The carrier appealed the hearing officer's finding of fact that the claimant cooperated with DARS. Rule 130.102(d)(2) provides that an

injured employee has made a good faith effort to obtain employment commensurate with his ability to work if the employee has been enrolled in, and satisfactorily participated in a full-time vocational rehabilitation program (VRP) sponsored by the Texas Rehabilitation Commission (TRC) (now part of DARS) during the qualifying period. The hearing officer correctly commented that the claimant inquired about DARS services and found that the claimant "cooperated with [DARs]." However making inquiry of DARS and cooperating with them does not meet the requirements of Rule 130.102(d)(2) that the claimant be "enrolled in" and "satisfactorily participated" in a VRP. We hold that the claimant did not meet the requirements of Rule 130.102(d)(2).

The claimant proceeded, and the hearing officer found that the claimant made a good faith effort to find employment commensurate with his ability to work. The carrier appealed that finding. Rule 130.102(d)(5) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has provided sufficient documentation as described in Rule 130.102(e) to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that, except as provided in Subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts, and that in determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(5), the reviewing authority shall consider the information provided by the injured employee, which may include, but is not limited to information listed in subsection (e)(1)-(11).

The claimant testified, and the hearing officer recited, that the claimant, after consulting with an attorney about social security benefits, contacted the Division field office on October 13, 2005 (11 days after the beginning of the qualifying period) to inquire about SIBs. According to Dispute Resolution Information System (DRIS) notes in evidence the Division apparently did not have the Report of Medical Evaluation (TWCC-69). The DRIS notes reflect that the information was obtained, the data was entered into the system and an Application for Supplemental Income Benefits (TWCC-52) was mailed to the claimant on October 13, 2005. The DRIS notes indicate that an "EES-20 Letter" (a letter with a brochure and a TWCC-52) was sent to the claimant on October 14, 2005. In evidence as part of hearing officer's Exhibit No. 4 is a "CS-20 Letter (5/04)" giving the claimant information about SIBs to include the dates of the qualifying period, dates of the first quarter, MMI, IR and the January 7, 2006, filing deadline for the TWCC-52. A similar "CS-21 (9/04)" letter ("a SIBs 8 week Letter") dated November 22, 2005, was sent to the claimant on November 22, 2005.

The claimant testified that he began his job search contacts on October 14, 2005. According to the DRIS notes the claimant contacted the Division field office again on January 3, 2006, and submitted his completed TWCC-52 which showed 37 job contacts between October 17, 2005, and December 27, 2005, with at least one contact each week during that period. The claimant testified that he was told on January 3, 2006,

that he needed "three or four more contacts before [the application] could be approved." The claimant also testified that he was told to "just go get you 3 or 4 more places and that's just what I did." The claimant testified that he back dated the four additional contacts he made on January 4, 2006, to dates in the first two weeks of October 2005. A DRIS note dated January 3, 2006, states that the injured worker (IW) came in with his application, that "he did not have any job contacts for the first two weeks of the qualifying period from 10/02-10/15. Told IW we will hold app a few days before processing . . . ." A DRIS note dated January 4, 2006, states "IW in office to hand deliver the information needed by the OAO for the 1st Qtr SIBS app." A Notice of Entitlement to SIBs for the first quarter ("CS-22 (9/05)") was filed by letter dated January 6, 2006.

The hearing officer, in the Discussion portion of his decision, references Rule 130.103 and states that "the Division was dilatory in performing its duties as required under the rule, and Claimant did not begin his job search until he had received the letter." Rule 130.103(a) provides:

> (a) Commission Determination. For each injured employee with an [IR] of 15% of greater, and who has not commuted any [IIBs], the commission will make the determination of entitlement or non-entitlement for the first quarter of [SIBs]. This determination shall be made not later than the last day of the [IIBs] period and the notice of determination shall be sent to the injured employee and the carrier by first class mail or personal delivery.

Both the CS-22 letter dated January 6, 2006, and DRIS note Sequence No. 29 of 50 dated January 6, 2006, indicate that the Division had made its determination of entitlement not later than the last day of the IIBs period, which would have been January 13, 2006. We hold that the hearing officer erred in citing Rule 130.103 as a basis for failing to look for employment commensurate with his ability to work every week of the qualifying period and document his job search efforts.

The hearing officer cited Appeals Panel Decision (APD) 010815-s, decided June 6, 2001, as authority for his decision that the claimant was excused from the job search requirements of Rule 130.102(e) because the Division had failed to timely provide him with a customer service information letter. APD 010815-s, *supra*, cites the language in APD 010617-s, decided May 15, 2001, where a carrier had provided the claimant with the wrong dates for the qualifying period and the Appeals Panel in APD 010617-s wrote that a "carrier will not be permitted to attempt to defeat a claimant's good faith showing by arguing that the claimant did not document a job search in each week of the qualifying period when the claimant can demonstrate that he or she documented a weekly job search using the dates of the qualifying period the carrier provided on the TWCC-52." In APD 010815-s the Commission (now Division) notified the claimant on a TWCC-52 of the dates of the qualifying period and instructed the claimant to look for a job to match his ability to work during every week of the stated qualifying period (which had been based on an incorrect MMI date). The Appeals Panel then applied the decision in APD 010617-s, *supra*, holding that "since the claimant documented at least

one job search effort in every week of the qualifying period that was provided to him on the TWCC-52 . . . the claimant should not be denied SIBs based on a failure to document a job search every week of the correct qualifying period." In this case neither the carrier nor the Division mislead the claimant on the correct dates of the qualifying period.

The question then becomes whether the Division's failure to timely send the claimant a customer service letter (the CS-20 letter) excuses the claimant from doing the job search and documentation required by Rule 130.102(e). The hearing officer comments that the "Division should not impose requirements of a rule against Claimant unless the Division has complied with its own duties relative to that rule." We note that neither the 1989 Act nor the Division rules require that such an information letter be sent. The letters are computer generated pursuant to a customer service (formerly known as Employee/Employer Field Services (EES)) SIBS Procedure Manual, November 1997 (Revised). "Section E-SIBS Initial Determination Due" states: "1. The automated system will calculate the dates and will generate the 15-week [now known as the 17-week] letter (EES-20) [now known as the CS-20], 6-week [now known as 8 weeks] letter (EES-21) [known as the CS-21], TWCC-52, and information sheet." Although the procedure manual created the time frames for generating the letters, the manual is silent regarding if or when the generated information is to be sent to the parties and the consequences for failing to timely do so. It also seems the information is geared toward establishing benchmarks for the statutory required initial determination of SIBs. In APD 040229, decided March 11, 2004, a SIBs case, the claimant contended, among other things, that he should not be expected to have made a job search every week before he was advised that he needed to do so. The Appeals Panel held that the claimant, in that case, essentially was arguing that he was unaware of the applicable rule for establishing entitlement to SIBs and held that ignorance of the law does not excuse noncompliance with it, citing APD 951487, decided October 19, 1995. In the present case the hearing officer is essentially finding that because the claimant did not receive the CS-20 letter advising him of the dates of the qualifying period he was excused from complying with the requirements of Rule 130.102(e). In that neither the 1989 Act nor Division rules establish either a requirement or the consequences for failing to timely send the CS-20 letter, we decline to establish a new body of law that failure to timely send an informational letter establishes an exception to complying with duly established rules. The claimant did not look for employment commensurate with his ability to work every week of the qualifying period and document his job search efforts thereby failing to meet the requirements of Rule 130.102(e).

Accordingly we reverse the hearing officer's decision that the claimant is entitled to SIBs for the first quarter and render a new decision that the claimant is not entitled to SIBs for the first quarter.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge